

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

10 ASIF A. SIAL, an individual,) Case No.: 08-CV-0905 JM CAB
11)
12 Plaintiff,) **Plaintiff's Opposition To Defendant's**
13 v.) **Motion For Judgment On The Pleadings**
14)
15 UNIFUND CCR PARTNERS; and DOES 1) Date: August 1, 2008
through 10 inclusive;) Time: 1:30 p.m.
16) Dept.: 16
Defendants.)
17) The Honorable Jeffrey T. Miller
)

I.

FACTS

22 Defendant is a nationwide trafficker of stale consumer debt and a debt collector. At a
23 time unknown, it acquired information regarding two alleged credit card debts. On June 1,
24 2007, Defendant filed suit in the Superior Court of California, County of San Diego, Case
25 No. 37-2007-00059285-CL-CL-EC (the Action) to collect the debts from Mr. Sial.

26 Defendant falsely claimed it served Mr. Sial with a copy of the summons and
27 complaint on July 31, 2007, at 10339 San Vincente Blvd., Spring Valley, CA 91977. From
28 February 2007 through January 2008 (including the date of alleged service) Mr. Sial, his

1 wife, and their two children resided with his uncle at 564 Skyview St., El Cajon, CA 92020.
 2 The Spring Valley address was not Mr. Sial's home address, mailing address nor his business
 3 address. Defendant, therefore, did not legally effect service. *See Cal. Code of Civ. Proc. §§*
 4 415.10, and 415.20.

5 Despite Defendant's failure to serve Plaintiff or give him notice, it obtained a default
 6 judgment. It then collected on that judgment. In April 2008, Defendant garnished Mr. Sial's
 7 wages which was his first indication that he had been sued. Mr. Sial immediately began an
 8 investigation into why his wages were 25% lower than normal. He obtained a copy of the
 9 court file from the Action and discovered that Defendant, a company he had never heard of,
 10 had sued him on a First Card Cov [sic] Account and a Citibank account.

11 Mr. Sial had not made a payment on either of those accounts in the four years
 12 proceeding the filing of the Action. In fact, Citibank had reported his account as delinquent
 13 from September 2001. First Card Conv [sic] had reported his account as delinquent by May
 14 2003. The statute of limitations barred all of Defendant's claims in the Action; and its
 15 surreptitious judgment precluded Ms. Sial from filing a responsive pleading.

16 Ultimately Defendant forced Mr. Sial to hire an attorney who obtained a refund of
 17 money garnished, and got the action against Mr. Sial dismissed. Mr. Sial is now enforcing
 18 his rights under the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et*
 19 *seq.*, and California's counterpart, the Rosenthal Act, Cal. Civ. Code §1788 *et. seq.* for
 20 Defendant's illicit state court Action. Defendant filed this motion for judgment on the
 21 pleadings and Mr. Sial opposes it in its entirety.

22 II.

23 ISSUES

24 A. The Standard Of Review.

25 Defendant's motion is pursuant to Rule 12(c).

26 B. Whether The FDCPA Regulates Collection Actions.

27 Plaintiff bases his FDCPA claims on unlawful debt collection practices in connection
 28 with a state-court collection action. Defendant argues entitlement to a privilege pursuant to

1 the *Noerr-Pennington* doctrine for its violations of the FDCPA.

2 **C. Whether The Rosenthal Act Regulates Collection Actions.**

3 Plaintiff bases his Rosenthal Act claims on unlawful debt collection practices in
 4 connection with a state-court collection action. Defendant argues that it was entitled to a
 5 privilege pursuant to Cal. Civ. Code §47(b) for its violations of the Rosenthal Act.

6 **III.**

7 **ARGUMENT**

8 **A. The Court Must Construe This Motion In Plaintiff's Favor.**

9 A motion for judgment on the pleadings is governed by the same standards as a motion
 10 to dismiss for failure to state a claim. Great Plains Trust Co. v. Morgan Stanley Dean Witter
 11 & Co. (5th Cir. 2002) 313 F.3d 305, 313, fn. 8. The Court must assume that Mr. Sial alleged
 12 the truth. General Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist
 13 Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989). The Court must also draw any
 14 inferences in favor of Mr. Sial, the nonmoving party. Id. Moreover, "final disposition of a
 15 civil action on the basis of bare bones pleadings is a tortuous thing." Arthur H. Richland Co.
 16 v Harper (5th Cir. 1962) 302 F.2d 324, 325. This simple standard is often overlooked. Id.

17 **B. Congress And A Unanimous Supreme Court Have Established That The FDCPA**
 18 **Regulates Collection Actions; The Noerr-Pennington Doctrine Has No Effect On**
 19 **Plaintiff's Claims.**

20 Defendant argues that this court should be the first to hold that a state-court collection
 21 action is not subject to the FDCPA. Statutory interpretation and a unanimous United States
 22 Supreme Court have foreclosed that possibility.

23 1. The FDCPA Specifically Regulates Litigation Activities.

24 "The *Noerr-Pennington* doctrine is a generic rule of statutory construction." Sosa v.
 25 DIRECTV, Inc., 437 F.3d 923 (9th Cir. 2006). Defendant's points and authorities are based
 26 on the application of the *Noerr-Pennington* to statutes other than the FDCPA; however, every
 27 court to decide the issue in an FDCPA case that Plaintiff could find refused to apply the
 28 *Noerr-Pennington* doctrine to the FDCPA. *See, e.g., Ison v. Javitch, Block & Rathbone,*

1 2007 WL 2769674 (S.D. Ohio 2007) (holding that defendants “are also not entitled to
 2 immunity under the *Noerr-Pennington* doctrine” in an FDCPA case); and Barany-Snyder v.
 3 Weiner, 2007 WL 210411 (N.D. Ohio 2007) (“the Court declines to announce a far-reaching
 4 rule all litigation is protected by this [the *Noerr-Pennington*] doctrine”).

5 In fact, pursuant to a unanimous Supreme Court decision, every court to construe the
 6 FDCPA must find that it regulates litigation activities. Quite simply, a debt collector does
 7 not have a privilege to violate collection laws because it is engaged in litigation on the debt.

8 In Heintz v. Jenkins (1995) 514 U.S. 291 a debt collector and attorney filed a state-
 9 court collection action against a consumer, Darlene Jenkins. During the litigation the lawyer
 10 for the debt collector gave a false impression of the amount of the debt and the consumer
 11 sued the debt collector and its attorney under the FDCPA. The case wound its way to the
 12 Supreme Court. A unanimous court held that “the Act does apply to lawyers engaged in
 13 litigation.” Id. at 294.

14 The court stated that “there are two rather strong reasons for believing that **the Act**
 15 **applies to the litigating activities** of lawyers.” Id. at 294. The first was basic statutory
 16 construction. Id. at 204. The second was that Congress repealed an exemption originally
 17 enacted for lawyers “without creating a narrower, litigation-related, exemption to fill the
 18 void.” Id. at 294.

19 After Heintz, Congress passed an amendment to the statute that provides further
 20 confirmation that there is no exemption for a state-court collection actions. Congress
 21 amended 15 U.S.C. §1692e(11) (which requires debt collectors to disclose that
 22 communications are from a debt collector) to state that *only* that provision “shall not apply to
 23 a formal pleading made in connection with a legal action.”

24 If Defendant was correct that the state-court collection action was “entirely exempt
 25 from the FDCPA, §1692e(11)’s express exemption of formal pleadings would be
 26 unnecessary.” Sayyed v. Wolpoff & Abramson, 485 F.3d 226, 231 (4th Cir. 2007). “Courts
 27 should disfavor interpretations of statutes that render language superfluous.” Id.
 28 “Furthermore, because Congress is presumed to act with awareness of a judicial

1 interpretation of a statute, the fact that the amendment occurred after Heintz further indicates
 2 that Congress was aware of the Court's interpretation of the FDCPA and accepted it." Id.
 3 "Under multiple precepts of statutory interpretation, Congress' amendment of §1692e(11)
 4 provides clear evidence that **litigation activity is subject to the FDCPA.**" Id.

5 The Ninth Circuit also made it clear that a state-court collection action would be
 6 covered by the FDCPA. The Ninth Circuit held that the filing of an application for a writ of
 7 garnishment, a legal activity, by a debt collector brings FDCPA liability. Fox v. Citicorp
 8 Credit Servs., 15 F.3d 1507 (9th Cir. 1994) ("portions of the legislative history make it clear
 9 that Congress intended 'purely legal' activity of [debt collectors] to be subject to the
 10 FDCPA"). Similar to Fox Mr. Sial's case involves a wrongful application for a writ of
 11 garnishment.

12 The FDCPA does not impinge on any constitutional right. *See Gionis v. Javitch, Block*
 13 & Rathbone, LLP, 238 Fed.Appx.24, 26 (6th Cir. 2007) (if the Constitutional argument were
 14 accepted it "would, of course, undercut Heintz v. Jenkins – where the Supreme Court held
 15 that 'the Act applies to attorneys who 'regularly' engage in consumer-debt-collection
 16 activity, even what that activity consists of litigation"). The Act regulates commercial speech
 17 and both Congress and a unanimous Supreme Court confirm that it applies to litigation
 18 activities. The *Noerr-Pennington* doctrine does not shield Defendant for its violations of the
 19 FDCPA that occurred during litigation.

20 2. The Action Was A Sham.

21 Moreover, *Noerr-Pennington* immunity will not be granted if a defendant's petitioning
 22 activity was a sham. City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380
 23 (1991). The most basic formulation of the 'sham exception' is when a defendant abuses a
 24 governmental process with neither the desire nor expectation of achieving a governmental
 25 result from that process. Id.

26 A misrepresentation will transform otherwise immune petitioning into unprotected
 27 "sham" petitioning if the petitioning were directed at an "adjudicatory" process, rather than
 28 an "political" process. Kottle v. Northwest Kidney Centers, 146 F.3d 1056, 1060-62 (9th

1 Cir. 1998).

2 In Kottle the court identified three circumstances in which the sham litigation
 3 exception might apply: first, where the lawsuit is objectively baseless and the defendant's
 4 motive in bringing it was unlawful. Id. at 1060. This is precisely the case. Defendant's
 5 lawsuit was objectively baseless as they filed it past the statute of limitations. Its motivation
 6 was also unlawful. *See Kimber v. Fed. Fin. Corp.* (M.D. Ala. 1987) 668 F.Supp. 1480, 1487
 7 ("time barred lawsuits are, absent tolling, unjust and unfair as a matter of public policy, and
 8 this is no less true in the consumer context").

9 The second exception to *Noerr-Pennington* is where the conduct involves a series of
 10 lawsuits "brought pursuant to a policy of starting legal proceedings without regard to the
 11 merits" and for an unlawful purpose. Id. And the third exception is if the allegedly unlawful
 12 conduct "consists of making intentional misrepresentations to the court, litigation can be
 13 deemed a sham if a party's knowing fraud upon, or its intentional misrepresentations to, the
 14 court deprive the litigation of its legitimacy." Id. These exceptions also apply as the Action
 15 was a misrepresentation of Defendant's right to collect the debts from Plaintiff. Defendant's
 16 right to petition was not burdened as the lawsuit it filed was a sham.

17 3. This Court Should Not Overturn Decades Of Jurisprudence By Expanding The
 18 *Noerr-Pennington* Doctrine.

19 Along with the strong legal arguments that the *Noerr-Pennington* does not apply to this
 20 case, there are also sound public policy reasons to not give a privilege to debt collectors for
 21 violating collection-law during litigation.

22 No court has ever held that the *Noerr-Pennington* doctrine applies to an FDCPA cause
 23 of action. More than twenty years ago a federal court held that filing a lawsuit on a time-
 24 barred debt is an unfair and unconscionable means of collecting a debt, in violation of 15
 25 U.S.C. §1692f and 1692e(2)(A). *Kimber v. Fed. Fin. Corp.* (M.D. Ala. 1987) 668 F.Supp.
 26 1480, 1487. Since then every court to publish an opinion on the matter has confirmed.

27 The Supreme Court and circuit courts have repeatedly held that the FDCPA is
 28 an important tool to protect consumers from unscrupulous debt collection tactics used in

1 collection litigation. *See Heintz v. Jenkins* (1995) 514 U.S. 291; *Goldman v. Cohen* (2nd Cir.
 2 2006) 445 F.3d 152, 155; *Todd v. Weltman, Weinberg & Reis Co. L.P.A.* (6th Cir. 2006) 434
 3 F.3d 432; *Freyermouth v. Credit Bureau Servs., Inc.*, 248 F.3d 767 (8th Cir. 2001); and *Fox*
 4 *v. Citicorp Credit Servs.*, 15 F.3d 1507 (9th Cir. 1994).

5 Moreover, because *Noerr-Pennington* also applies to pre-suit demand letters if it were
 6 applied to the FDCPA it would completely dilute the FDCPA. Nearly every collection letter
 7 by a debt collector is in some manner a pre-suit demand letter.

8 This court should not be the first in the country to hold that a debt collector has a
 9 privilege to violate the FDCPA merely because it is also engaged in litigation. If debt
 10 collectors were given that immunity it would disrupt the widely accepted and established
 11 jurisprudence.

12 **C. The Rosenthal Act Was Specifically Intended To Prohibit Unfair Or Deceptive
 13 Litigation Activities; Applying The Statutory Litigation Privilege Would Defeat
 14 The Purpose Of The Act.**

15 1. Statutory Construction Holds That Defendant's Motion Should Be Denied.

16 Mr. Sial alleged Defendant violated Cal. Civ. Code §1788.15, a provision of the
 17 Rosenthal Act, which states:

18 (a) No debt collector shall collect or attempt to collect a consumer debt means of
 19 judicial proceedings when the debt collector knows that service of process, where
 20 essential to jurisdiction over the debtor or his property, has not been legally effected.

21 This provision specifically addresses unlawful debt collection that occurs during
 22 judicial proceedings. Defendant's argument that Cal. Civ. Code §47(b) shields a debt
 23 collector from violation of Cal. Civ. Code §1788.15(a) renders the statute meaningless.
 24 Every violation of Cal. Civ. Code §1788.15(a) necessarily occurs during litigation.

25 Another provision is also specifically addressed at unlawful collection practices that
 26 occur during litigation. Cal. Civ. Code §1788.15(b) makes it unlawful to attempt or collect to
 27 attempt a consumer debt in a judicial proceeding filed in an improper venue.

1 Moreover, “the term ‘debt collection’ means **any** act or practice in connection with the
 2 collection of consumer debts.” Cal. Civ. Code §1788.2. Defendant argues that this court
 3 should read in an exemption to the statute for litigation activities. However, the plain
 4 language of the statute clearly indicates that there is no such exemption. There simply is no
 5 privilege for a debt collector to violate the Rosenthal Act because it also sued a consumer.

6 2. Case-Law Directly On Point Holds Defendant’s Motion Should Be Denied.

7 Mr. Sial also alleged that Defendant violated Cal. Civ. Code §1788.17 which
 8 incorporates the violations of the FDCPA into the Rosenthal Act. Defendant argues that it is
 9 also not liable for these violations because of the litigation privilege.

10 However, the central district recently held that the California statutory litigation
 11 privilege does not apply to claims brought under the Rosenthal Act. Oei v. N. Star Capital
 12 Acquisitions, LLC., 486 F. Supp. 2d 1089, 1100 (C.D. Cal. 2006). In Oei, the plaintiffs
 13 claimed, *inter alia*, that the defendants filed a state-court collection suit to collect a debt the
 14 consumer did not owe (the identical allegation at issue in the present case).

15 The Oei court stated: “Were the privilege to apply broadly to Rosenthal Act claims,
 16 however, it would effectively immunize conduct that the Act prohibits.” Id. at 1100. If
 17 Defendant’s argument were accepted then “**applying the privilege in this manner would**
 18 **effectively vitiate the Rosenthal Act** and render the protections it affords meaningless.” Id.
 19 at 1100 (emphasis added).

20 The court then applied “the familiar principle of statutory construction that, in cases of
 21 irreconcilable conflict, the specific statute prevails over the general one.” Id. at 1100. The
 22 court also noted that “California courts, in analogous contexts, have applied this principle to
 23 override application of the litigation privilege.” Id. at 1101 (citations omitted).

24 The court quoted the California Court of Appeal in Schoendorf v. U.D. Registry, Inc.,
 25 97 Cal. App. 4th 227, 243 (2002): “to the extent that the [California Consumer Credit
 26 Reporting Agencies Act and the federal Fair Credit Reporting Act] cannot be reconciled with
 27 the privilege, the CCRAA and FCRA, being more specific, prevail over the litigation
 28 privilege, which is more general.” Id. at 1101.

1 In an even more recent case Mello v. Great Seneca Financial Corp. 526 F.Supp.2d
 2 1024, 1030 (C.D. Cal. Nov. 5 2007), the court held that “the litigation privilege cannot
 3 immunize [a debt collector’s] state court lawsuit from liability under California’s more
 4 specific consumer protection statute, the Rosenthal Act.”

5 In another recent case from the central district, Butler v. Resurgence Financial, LLC,
 6 521 F.Supp.2d 1093, 1095 (C.D. Cal. Nov. 6, 2007), the court stated that the “better view” is
 7 to hold that the litigation privilege does not apply to the Rosenthal Act. The Butler court
 8 found that the cases that conducted an in depth analysis comparing the two statutes came to
 9 the identical conclusion. Id. And that “a remedial statute should be interpreted broadly in
 10 order to effectuate its purpose.” Id.

11 Courts in the central district have also reached the opposite conclusion. *See* Nickoloff
 12 v. Wolpoff & Abramson, L.L.P., 511 F.Supp.2d 1043 (C.D. Cal 2007); and Taylor v. Quall,
 13 458 F. Supp. 2d 1065, 1068 (C.D. Cal. 2006). However, in both of those cases the courts did
 14 not discuss the conflict between the Rosenthal Act’s prohibition of certain litigation activities
 15 and the litigation privilege, nor does it discuss the vitiation of the Rosenthal Act that would
 16 be accomplished by its application. Moreover, both cases occurred before both Mello and
 17 Butler. A court in the northern district (Reyes v. Kenosian & Miele, LLP, 525 F.Supp.2d
 18 1158 (N.D. Cal. 2007)) and one in the eastern district (Johnson v. JP Morgan Chase Bank,
 19 536 F.Supp.2d 1207, (E.D. Cal. 2008)) have also reached the opposite conclusion.

20 Plaintiff urges this court to follow the well-reasoned principles laid out in Oei, and
 21 then followed by Mello and Butler as they are recent decisions and the most well-reasoned
 22 analysis of the issue.

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IV. CONCLUSION

Debt collectors do not have a privilege to violate collection laws because they are engaged in litigation. Congress and a unanimous Supreme Court held that the FDCPA regulates collection activity in litigation. Statutory construction and case-law directly on point hold that claims under the Rosenthal Act are not subject to the litigation privilege. This court should deny Defendant's motion in its entirety.

DATE: July 15, 2008

BY: /S/ Jeremy S. Golden
Jeremy S. Golden,
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, Dorian Hudson, declare that:

I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to this action. My business address is 2300 Boswell Rd Ste 211, Chula Vista, CA 91914. I am employed in San Diego County, CA.

I served the following:

**Plaintiff's Opposition To Defendant's Motion For Judgment On The
Pleadings**

United States District Court, Southern District Case No. 08-CV-0905 JM CAB

On July 15, 2008 I e-filed using CM/ECF.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed July 15, 2008 at Chula Vista, CA 91914.



Dorian Hudson